HARLON S. DOBSON
CYNTHIA D. DOBSON

IBLA 85-427 Decided December 15, 1986

Appeal from decisions of the Nevada State Office, Bureau of Land Management, rejecting desert land applications N-29258 and N-29262.

Affirmed.

1. Act of August 18, 1894--Applications and Entries: Generally--Desert Land Entry: Generally--Desert Land Entry: Applications--Desert Land Entry: Water Right

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

APPEARANCES: Dale T. Coulam, Esq., Las Vegas, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Harlon S. Dobson and Cynthia D. Dobson have appealed from separate decisions of the Nevada State Office, Bureau of Land Management (BLM), each dated January 29, 1985, rejecting their respective desert land entry applications N-29258 and N-29262, each for 320 acres of public lands in sec. 1, T. 4 N., R. 50 E., Mount Diablo Meridian, Nevada. Appellants filed their applications on February 19, 1980, pursuant to the Desert Land Act, 43 U.S.C. §§ 321-339 (1982). On May 4, 1982, BLM issued separate decisions informing appellants that their applications contained several deficiencies and stating that the applications could not be considered "complete" and could not be "processed until these deficiencies [were] corrected." Appellants returned the applications within the allotted 30-day period, and BLM accepted them as "complete" on June 1, 1982.

Prior to appellants' desert land filings, the State of Nevada on March 30, 1979, submitted a letter to BLM which included an attached list of

525 applications pending under the State's Carey Act laws. Among those 525 State Carey Act applications was one numbered 32, filed by Hot Creek Irrigation Co., Inc., covering sec. 1, T. 4 N., R. 50 E., Mount Diablo Meridian, Nevada, the same land for which appellants had applied under the Desert Land Act. 1/ The letter included the following paragraph:

> Inasmuch as we want to protect these applicants from potential overlap by Desert Land Entry applications, and because you will not formally accept these until the federal regulations are released, 2/ please consider these as tentative filings for segregation under the Carey Act.

BLM accepted the list and the 525 applications were noted on the public records under one serial number, N-22893.

1/ The application of Hot Creek Irrigation Co., Inc., was made pursuant to the State's Carey Land Act, which is subject to the provisions of the Act of August 18, 1894, as amended, 43 U.S.C. §§ 641-648 (1982) (Carey Act). Nev. Rev. Stat. § 324.120(1) (1979) provides that:

"[a]ny natural person, association, company or corporation desiring to construct impounding dams, canals, ditches or other irrigation works, pumping plants, or artesian wells to reclaim lands under the provisions of this chapter, may file with the division an application for any land which is listed by the division as being available for reclamation through the division."

Nev. Rev. Stat. § 324.160(1) (1979) contemplates that once the Secretary of the Interior approves such application for segregation, a company such as Hot Creek Irrigation may enter into a contract with the state authority. That contract must include the following information:

"(a) Such complete specifications with respect to the system of irrigation works proposed to reclaim the lands of the segregation as the division prescribes by regulation.

"(b) The price, conditions and terms per acre at which the irrigation works and perpetual water rights will be sold to settlers.

"(c) The price, terms and conditions on which the state is to dispose of the lands to settlers.

"(d) Such additional requirements and stipulations as are necessary to protect the good reputation of the state and the rights of all parties in interest from the date of the contract to the complete consummation of the enterprise."

2/ In 1970 the Department removed the regulations governing Carey Act applications from Title 43 of the Code of Federal Regulations. 35 FR 3072 (Feb. 17, 1970). However, the Department promulgated new Carey Act regulations published in the Federal Register on May 21, 1980, with an effective date of June 20, 1980. 45 FR 34230. In the preamble to those regulations the Department stated:

"Regulations were removed from Title 43 in 1970 because there was then no active interest in grants under the [Carey] Act by the States. Applications have since been filed under the Act. Regulations are needed to guide the processing of applications by the States for desert lands for reclamation and settlement for agricultural purposes." 45 FR 34230 (May 21, 1980).

On January 2, 1981, the State of Nevada filed Carey Act application N-31758, which included sec. 1, T. 4 N., R. 50 E., Mount Diablo Meridian, Nevada. 3/ On April 6, 1981, BLM received a letter from the State requesting that BLM "please remove from the bureau's records the Carey Act applications contained on the original list and amendments thereto that were posted to the records under serial number N-22893." The State offered the following reason for the withdrawal of N-22893:

> In the past two years, we have cancelled several hundred Carey Act applications. In addition, the Carey Act applications that are being officially submitted now for availability and suitability determinations are being issued different serial numbers for the same lands contained within N-22893.

By letter dated March 15, 1985, BLM advised Nevada that case file N-22893 had been closed and all notations would be removed from official records.

BLM issued a "Proposed Classification Decision," dated May 25, 1984, which determined that sec. 1, T. 4 N., R. 50 E., Mount Diablo Meridian, Nevada, was classified as "suitable for entry" under both the Desert Land Act and the Carey Act. On August 2, 1984, BLM issued its "Initial Classification Decision" to the same effect. 4/

By memorandum dated September 28, 1984, the Battle Mountain BLM District Manager advised the Nevada State Director as follows:

> Two sections of land [including that section which is the subject of this appeal] suitable for agricultural use have both Carey Act and Desert Land applications on them. Prior to allowing entry to the earliest filed application on each parcel, it should be confirmed that the applicant's water filing is still active and in his/her name.

In a copy of "Report of Telephone Conversation" dated November 20, 1984, a BLM employee recounted that he was informed by Nevada's State Water Engineer that the State had filed water permit applications for its Carey Act application N-31758 on April 14, 1977, while appellants had filed water permit

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3/ This Jan. 2, 1981, Carey Act application, again in conjunction with Hot Creek Irrigation Co., Inc., covered sections 1, 2, 11, 12, 13, and 14, of T. 4 N., R. 50 E., and W 1/2 of sec. 17, T. 4 N., R. 51 E., Mount Diablo Meridian, Nevada.

4/ The Department's regulations at 43 CFR Subpart 2450, entitled "Petition-Application System," prescribes the procedures followed by BLM in this case. The land subject to this appeal had not been classified as suitable for entry under either the Desert Land Entry Act or the Carey Act; accordingly, both the Dobsons and the State were required to "file their applications together with a petition for classification on a form approved by the Director." 43 CFR 2450.1. The regulations are clear that "[n]o further consideration will be given to the merits of an application or the qualifications of the applicant unless or until the land has been classified for the purpose for which the petition-application has been filed." 43 CFR 2450.2.

applications for desert land applications N-29258 and N-29262 on February 19, 1980, and that State law mandated that the earliest water filing be honored if lands were available. The copy of the report in the case file for N-29258 contained the notations: "Issue Carey Act N-31758 Reject this one because of water priority."

On December 4, 1984, BLM issued its decision approving Carey Act application N-31758. On January 29, 1985, BLM issued separate decisions to appellants, informing them that their desert land applications had been rejected because "entry to the land was granted under the Carey Act to the State of Nevada." 5/

On appeal appellants argue that BLM erred in rejecting their applications because the controlling priority under either the Desert Land Act or the Carey Act is the order of filing for the land, not the order of filing for State water permits. Appellants cite Blaine Sharp, 89 IBLA 400 (1985), in support of their contention. In Blaine Sharp, BLM had considered all desert land entry applications filed by a date certain to be simultaneously filed and had held a drawing to determine priority. The Board stated therein:

> However, contrary to appellant's contentions, the priority for desert land applications for these particular public lands in Nevada was not established by the order of filing applications for water rights with the State, but rather by the simultaneous drawing held by BLM on July 30, 1979. This procedure was established by the Federal Register notice of December 21, 1978, and was properly carried out pursuant to the cited regulations in 43 CFR 1821.2-3. If the priority were established as appellant asserts, there would be no useful purpose served by BLM holding a simultaneous drawing and the State of Nevada [sic] would be in control of the disposition of these public lands. That result clearly was not the intent of opening these lands to desert land applications, and BLM properly determined that appellant's application should be rejected in the face of the allowed entry for the same lands.

89 IBLA at 402.

Thus, we conclude that BLM erred in determining that priority between appellants' applications and the State's Carey Act application was controlled by the priority of filing for State water permits. Appellants are correct in their assertion that priority of filing of the desert land entry and Carey Act applications is determinative. We, therefore, will examine the record to determine whether appellants or the State have priority based on their respective applications.

5/ While the decisions did not disclose BLM's reason for having granted the State's application, appellants' statement of reasons indicates they were aware of it.

[1] Appellants originally filed their desert land applications on February 19, 1980, pursuant to the Desert Land Act, which states in relevant part:

> It shall be lawful for any citizen of the United States * * * to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: Provided, however, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation * * *.

43 U.S.C. § 321 (1982).

Evidence of the applicant's right to conduct water upon the desert lands proposed to be reclaimed is a vital prerequisite to approval of a desert land application. The Department's regulations make this abundantly clear:

> No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entry-man has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right.

43 CFR 2521.2(d).

Both appellants' desert land applications indicated that the source of water for the proposed irrigation was to be a well with a depth of static water of 250' and a diameter of 16". In addition, both applicants answered "yes" to question 12b, which asked, "Have you proceeded as far as possible toward acquiring by appropriation, purchase, or contract, a right to permanent use of sufficient water to irrigate and reclaim permanently all of the irrigable portions of each of the legal subdivisions applied for?" The application form explains, in language consistent with the regulation, that if the answer is "yes," the applicant "must present as evidence <u>and make a part of this application</u> copies of any committments you may have, which show the legal source of your proposed water supply." (Emphasis added). As noted, appellants failed to file that information with their applications, but in response to notices of deficiencies, they cured those applications on June 1, 1982. 6/

The Board has held that where a desert land applicant indicates on the application that he or she has proceeded as far as possible in obtaining a water right but has failed to document that fact in the application, the applicant will be afforded the opportunity in accordance with 43 CFR 2521.2(d) to submit proof to corroborate the assertion in the application. Jean P. Walsh, 89 IBLA 311, 313 (1985). 7/ The rule applied by this Board in determining priority to be accorded a deficient application is quite simple: An application for desert lands which does not conform to mandatory regulatory requirements earns no priority as against a subsequent complete application which is filed before the defective application is remedied. A clear application of that rule appears in Thomas D. Nighswonger, 6 IBLA 341 (1972), in which appellant's application contained several deficiencies. The land office informed appellant that his application could not be considered as "officially filed" until corrected, that another application had been perfected meanwhile, and that the properly filed application was entitled to priority. The Board approved the land office's action. Also, in Sandy C. Baicy, 46 IBLA 140 (1980), the Board stated that where a desert land entry application is not properly signed and dated by the applicant, the applicant's preference right of entry is extinguished, and that the application may be treated as a proper application and accorded priority only from the date of signing.

While the cited cases involved conflicting desert land entry applications, the rule is equally applicable where the conflict is between desert land entry applications and a Carey Act application. This is consistent with the regulation at 43 CFR 2611.1-5, which provides that "[p]roperly filed

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6/ The notices of deficiencies each provided as follows:

"Your application is hereby returned so the following questions on the form can be answered and/or the information provided:

"Questions: 3f - Please answer this question. [whether applicant is an employee, spouse or agent of an employee of the Department of the Interior] 5 - By signing the application, you have certified that you have made a personal examination of the land you have applied for; yet, you have marked item 5 "no." Please explain.

12b - You have answered this question "yes." This response requires submission of evidence that you have filed a water permit application with the State Water Engineer's Office or evidence of the source from which your irrigation water is being obtained (i.e., private water rights you are purchasing). Your application either does not contain the above evidence or your water permit application was cancelled by the State Engineer's Office as an incomplete application. If "yes" is not an accurate response, please correct your application by answering "no" to this question.

"Your application cannot be considered complete and cannot be processed until these deficiencies are corrected."

7/ This case may be contrasted with those cases in which the applicant indicated on the face of the application that he had not proceeded as far as possible in obtaining a water right. Albert N. Smith, 87 IBLA 253 (1985); Dale Christiansen, 82 IBLA 97 (1984). In those cases BLM properly rejected the applications without requiring further information.

applications under * * * [the Carey Act] shall have priority over any subsequently filed agricultural applications for lands within the project boundaries."

In this case, the State of Nevada filed an acceptable Carey Act application on January 2, 1981, 18 months before the Dobsons perfected their filings on June 1, 1982. For that reason we must conclude that the State's application had priority over the appellants' applications. Therefore, their applications were properly rejected. 8/

The Dobsons object that BLM failed to inform them of the deficiencies for over 2 years after they first submitted their applications, and when notified, they corrected those deficiencies within the prescribed 30-day period. BLM was under no obligation to review appellants' applications, immediately. See Gene L. Morrison, 77 IBLA 325, 326 (1983); Michael C. Heaney, 21 IBLA 339, 341 (1975). The burden of providing a complete application rested with appellants. The application form clearly stated that evidence concerning the proposed water supply had to be included with the application.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Anita Vogt
Administrative Judge
Alternate Member

C. Randall Grant, Jr.
Administrative Judge

8/ It is also arguable that the State's filing in March 1979 of the group of Carey Act applications prior to appellants' initial filings established a priority for the State. We need not decide that question, or the question whether the State's 1979 filing segregated the land, however, since the filing of the State's application N-31758 clearly predated appellants' perfection of their applications.